

The Peace-Making Role of a Mediator

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The office of mediator requires as great a degree of integrity, as of prudence and address. He ought to observe a strict impartiality; he should soften the reproaches of the disputants, calm their resentments and dispose their minds to a reconciliation . . . There cannot be a more beneficent office, and more becoming a great prince, than that of reconciling two nations at war, and thus putting a stop to the effusion of human blood: it is the indispensable duty of those who have the means of performing it with success.¹

I. INTRODUCTION

Mediation, or the intervention of third parties, has been a tested and tried means of dispute resolution since the earliest history of the world. It was widely used in both Rome and Egypt and by the Greek city-states in connection with their wars. Indeed, emperors and rulers at different points in history were called on to assist in the resolution of disputes involving other states and nations. Louis IX became world renowned in that role, sought both from inside and outside his country to arbitrate and mediate disputes.² More recently, we have witnessed a former President of the United States, Jimmy Carter, playing such a role on the world stage, and his former Secretary of State, Cyrus Vance, one of my great heroes, played such a role as well. The citation accompanying the Nobel Peace Prize given to President Carter spoke admiringly and deservedly of his role in mediating disputes.³

* In connection with this Article, I have been the beneficiary of communications from many fine people who are or have been involved with mediation in Northern Ireland, and I express to each my deep gratitude. They are: Avery Bowser, Dominic Bryan, Brian Currin, Michael Doherty, Seamus Dunn, Brendan McAllister, Billy Robinson, Brian Speers and Sue Williams. Most especially, I thank my colleague Professor Jacqueline Nolan-Haley, my assistant, Derek Hackett, and Fordham Law School students McKenzie Livingston and Jeremy Klatell for their enormous assistance with this undertaking.

¹ EMMERICH DE Vattel, *LAW OF NATIONS*, bk. II, ch. XVIII, § 328 and bk. IV, ch. II, § 17 (1835).

² THE COLUMBIA ENCYCLOPEDIA, *Louis IX*, (5th ed. 1993).

³ When awarding the Nobel Peace Prize to President Carter in 2002, the Norwegian Nobel Committee described Carter's mediation as a "vital contribution" to the Camp David Accords and further stated that Carter has "stood by the principles that conflicts must as far as possible be resolved through mediation and international co-operation based on international law, respect for human rights, and economic development." 2002

Hugo Grotius, the father of international law, spoke often of the importance of mediation and other forms of dispute resolution as a way to avoid or end hostilities.⁴ Given the consequences of war, Grotius emphasized the importance of using such approaches, pointing to historical and successful examples of third party intervention. Not surprisingly, the United Nations Charter singles out mediation as a major tool of dispute resolution.⁵

The theme for this program, the Americanization of International Dispute Resolution, asks whether there is an American style of dispute resolution and, if there is, whether it is positive or negative for the peaceful settlement of international disputes. In approaching my assignment of Mediation in Armed Conflict, I have focused my attention on Northern Ireland, a society that has experienced a violent conflict for the past thirty years, in which many efforts at mediation have taken place at all levels of the society.⁶ There have been mediation successes and some failures but its usefulness as a means of mitigating conflict in the North is clear.⁷

Part I of this Article provides a brief description of the American mediation process through the lens of my experiences as a mediator. Part II examines the conflict in Northern Ireland and the tools used by George Mitchell during the peace process. Part III analyzes criticisms of the use of the so-called American-style of mediation in international conflicts.

II. AMERICAN MEDIATION PRACTICE

Perhaps is it provocative to ask whether there is an American style of mediation. I would begin by noting that there are many styles in helping parties reach agreement. One approach is that of a facilitative role, helping parties communicate with each other, identifying their interests, and

Nobel Peace Prize Awarded to President Carter, Oct. 11, 2002, *available at* <http://www.cartercenter.org/viewdoc.asp?docID=1235&submenu=news>.

⁴ HUGO GROTIUS, *THE LAW OF WAR AND PEACE*, bk. II, ch. XXIII, pt. VIII and bk. III, ch. XX, pt. XLVI (Bobbs-Merrill ed. 1962).

⁵ U.N. CHARTER, art. 33(1) states that "[t]he parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice."

⁶ For a detailed description of the conflict in Northern Ireland, see J. BOWYER BELL, *THE IRISH TROUBLES: A GENERATION OF VIOLENCE 1967-1992* (1993). For political and academic commentary on the peace process see Seamus Dunn & Jacqueline Nolan-Haley, *Conflict in Northern Ireland After the Good Friday Agreement*, 22 *FORDHAM INT'L L.J.* 1372 (1999).

⁷ Dunn & Nolan-Haley, *supra* note 6, at 1379-82.

exploring with them options for resolving their dispute. Another method used by mediators involves defining the problem broadly, looking at all the interests of the parties, and engaging them in a problem-solving, collaborative process. A third approach relies on evaluations—providing information and offering views, opinions and proposals on the subject of the dispute. Yet another approach combines all of the above approaches, in different, or even in the same mediation, depending on the wishes of the parties and sometimes at the initiative of the mediator in the particular dispute.

Despite style differences, there is certainly wide agreement among mediation practitioners on the importance of a mediator being neutral and impartial. There is also agreement on the importance of the process being fair and party-oriented. To assure neutrality, mediators make disclosures of possible conflicts, avoid conduct that may give the appearance of partiality toward one of the parties, and respect the right of a party to reach a voluntary, uncoerced agreement. To assure fairness, mediators keep the secrets and confidences of the parties and make commitments to diligence and procedural fairness. There is also consensus on the need for mediators to be able to meet the reasonable expectations of the parties—to be competent in serving as an intermediary in helping them find a solution. However, the widest of agreement is on the importance of the mediator having the qualities essential for inspiring confidence and trust. Even-handedness, commitment, independence, and good judgment are among these, as well as such qualities as being patient, calm, humble, and a good listener. An example of a mediator who embodies such qualities is George Mitchell, a former United States Senator, who chaired the peace talks in Northern Ireland. In his book describing the peace process, George Mitchell observed, “[f]or the two years of negotiations, I listened and listened, and then I listened some more. At times it was interesting, at times entertaining; it was also often repetitive, frustrating, and deliberately quarrelsome.”⁸ He added, “I believe in letting people have their say. It was important, I told them, not to cut anyone off at this stage. When the right time comes, I said, I’ll bring this to a conclusion.”⁹

As a lawyer who grew up in the world of labor management disputes, particularly in the area of newspaper disputes, I became accustomed to positions being repeated again and again, along with the flexing of muscle.¹⁰

⁸ GEORGE MITCHELL, *MAKING PEACE* ix (1999).

⁹ *Id.* at 86.

¹⁰ Each side to a collective bargaining agreement often hints at or reminds the other party of its ability to, in the case of the employer, lockout and, in the case of the union, strike, if its needs or demands are not met. A union might take a strike vote of its

It was not unusual in collective bargaining negotiations to have the intervention of mediators, who used a variety of tools and strategies to reach a solution to the dispute at hand. Among these were the use of committees, subcommittees, caucuses, and shuttle diplomacy to foster communication, which eventually moved to around the clock negotiations and, at the point of exhaustion, hopefully, an agreement. Often, in the final agreement committees were established to study and report on intractable issues incapable of resolution at the point of the settlement. Sometimes, if it appeared that ratification was in jeopardy, accompanying letters were drafted to explain what was meant by a paragraph. As for disagreements concerning what had been agreed to, the agreement itself usually provided for arbitration and possibly other steps at resolution before arbitration. Although other kinds of disputes have their characteristics, these are the patterns I have noticed through my experiences with the mediation process in the United States in the field of labor relations.

The growth of mediation in American legal practice has been transformative, often saving parties the enormous cost, delay, and trauma of traditional litigation. Increasingly, court programs require parties to mediate, or at least offer that as an option, and more and more business contracts contain provisions for the use of mediation before litigation. Typically, in these situations, a third party designated by the parties or by a procedure which they have agreed upon, meets with them, learns something about their dispute, receives information, both orally and in written form, and then develops with them a process involving both general and private meetings, along with intervening caucuses and shuttle diplomacy, to narrow the differences and find an acceptable resolution.

This very brief summary of mediation in America obviously just touches the surface.

III. NORTHERN IRELAND

Why have I chosen to focus on Northern Ireland? I am certainly no expert on that country, which I have come to like very much. I, however, have been involved, through my law school, in a number of activities in the North. I have been privileged to give talks there before various groups, including its Law Society, on the subject of alternative dispute resolution (ADR) in the United States. I also have visited Northern Ireland almost a dozen times since 1995, when I had the honor of being in a group which accompanied President Clinton on his historic visit to the North.

membership, for example, or an employer might enter into an agreement with a third party to operate its business in the event of a strike.

Since President Clinton's visit, much has happened in Northern Ireland. The country has had a long history of violent conflict, marked by killings, maiming, and destruction of property. Its soul has been seared by that conflict and by a deep hatred that goes back centuries. The violence of the past thirty years has touched almost every street and area in the North. In a country of one and one-half million inhabitants, it is said that one in every five hundred has been killed during the conflict and that one in every fifty has been injured in some way.¹¹ As George Mitchell wrote, "[t]wenty-five years of brutal sectarian war had scarred the bodies of thousands of men and women; it had more deeply scarred the hearts of everyone."¹²

But beyond the conflict, I need to add a note about the charm of the people in the North—their laughter and poetry, as well as their hopes, like ours, for their children and grandchildren to live in a more peaceful and just world. The present, with all of its difficulties and challenges, offers such possibility because of the political framework established by the 1998 Peace Agreement (hereinafter the Agreement).¹³ The Agreement is a tribute to the work of Senator George Mitchell, the Prime Ministers of Britain and Ireland, and the leaders of a number of the political parties in the North (two of whom won the Nobel Peace Prize in 1998).¹⁴ However, a word or two about the conflict in Northern Ireland and the events leading to the peace talks¹⁵ is necessary.

A. An Intractable Conflict

The conflict is often expressed in religious terms as a clash between Catholics and Protestants. To be sure, religion plays some part, as do lack of employment and other socio-economic factors. At the center of the conflict, however, is the issue of national identity.¹⁶ A great many Protestants want to keep Northern Ireland in union with the United Kingdom and, consequently,

¹¹ See, e.g., MITCHELL, *supra* note 8, at 174 (observing that the casualties of the conflict were 3,200 killed and 36,000 wounded).

¹² *Id.*

¹³ Agreement Reached in the Multi-Party Negotiations, Apr. 10, 1998 [hereinafter Agreement], available at <http://www.nio.gov.uk/issues/agreelinks/agreement.htm>. The Agreement is sometimes referred to as the Good Friday Agreement or the Belfast Agreement, depending on one's point of view.

¹⁴ David Trimble, leader of the Ulster Unionist Party and John Hume, leader of the Social Democratic and Labour Party.

¹⁵ Also referred to as the all-party or multi-party talks or negotiations.

¹⁶ See Stephen Farry & Sean Neeson, *Beyond the "Band-Aid" Approach: An Alliance Party Perspective Upon the Belfast Agreement*, 22 FORDHAM INT'L L.J. 1221, 1222–24 (1999).

they are called Unionists. A great many Catholics favor Northern Ireland becoming part of the Republic of Ireland and thus are labeled Nationalists. Not every Protestant or Catholic in Northern Ireland, however, can be identified with these points of view. Nevertheless, these competing identities lead to divisions on political, social, and cultural levels.¹⁷ Intractable and incessant division is further perpetuated by a perceived threat each community has regarding the other.¹⁸

Beginning in the 1980s and continuing through the mid-1990s, a number of important milestones occurred as a result of negotiations that took place between the British and Irish governments. These British-Irish agreements included: an Anglo-Irish Agreement in 1985, expressing a commitment that only the people of Northern Ireland could change its constitutional status; a Downing Street Declaration in 1993, setting out a general formula for participation in the peace talks by political parties associated with paramilitary organizations; and a Frameworks Document of 1995, creating the International Body on Decommissioning and setting a course for all-party negotiations. Also during this period the Irish and British governments had separate discussions with the political parties that had allegiances to them. Among these were discussions between the Irish government and the major Nationalist parties in the North, namely, the Social Democratic Labor Party and Sinn Féin (the political wing of the Irish Republican Army (IRA)).¹⁹ All of these discussions led to cease-fires in 1994 by the IRA and the Combined Loyalist Military Council. The British and Irish governments served a critical mediation function in laying the groundwork for the peace negotiations that began in June 1996.

B. Senator George Mitchell and the Peace Process

Senator Mitchell's appointment in 1996 to chair the all-party talks was foreshadowed by his assignments in Northern Ireland in 1995, after leaving the United States Senate. First he was appointed by President Clinton to organize a trade and investment conference. Then he was chosen as one of three members of the International Body on Decommissioning established by

¹⁷ See generally Barry A. Feinstein & Mohammed S. Dajani-Daoudi, *Permeable Fences Make Good Neighbors: Improving a Seemingly Intractable Border Conflict Between Israelis and Palestinians*, 16 AM. U. INT'L L. REV. 1, 43 (2000) (explaining that the primary reason for the Northern Ireland Troubles—national identity—encompasses divisions on social, cultural, and political grounds).

¹⁸ *Id.* at 44.

¹⁹ MITCHELL, *supra* note 8, at 17.

the Frameworks Document of 1995.²⁰ In the process he became familiar with Northern Ireland, its people, leaders, and history. Many in Northern Ireland also came to know him. Looking more closely at the peace talks as a possible case study of mediation at its best, one finds the most careful of attention given by Senator Mitchell to every aspect of the process.

In a word, Senator Mitchell's style was one of extreme sensitivity to the process, the rules adopted, the views and positions of the parties, and to the independence of his office. Although his selection by the British and Irish governments to chair the talks was objected to by some of the political parties,²¹ he was given many opportunities to demonstrate his independence and he did so. At the very outset, he agreed, in the face of strong Unionist objections, to change the rules that had been agreed to by the British and Irish governments for the talks. The Senator said, "I felt throughout the discussions that ultimately my ability to be effective would depend more upon my gaining the participants' trust and confidence than on the formal description of my authority."²²

The multi-party talks began with the development of a set of rules of procedure, which took almost two months to put in place.²³ By July 1996 there was agreement on the rules of procedure, which included provisions dealing with non-compliance by a party with respect to the conditions for entering into the talks,²⁴ the formula for voting on proposals,²⁵ and the confidentiality of the talks.²⁶ A period of several months then followed to

²⁰ *Id.* at 26–27 (describing how Harri Holkeri, a Finn chosen by the Irish, and John de Chastelain, a Canadian chosen by the British, were the other two members of the Body on Decommissioning; they later joined Mitchell as the independent chairmen of the peace talks).

²¹ *Id.* at 46–54 (discussing the controversy and opposition surrounding Mitchell's appointment as chair and further noting that two Protestant political parties—the Democratic Unionist Party (DUP) and the United Kingdom Unionist Party (UKUP)—were adamantly opposed to Mitchell serving as chair).

²² *Id.* at 57.

²³ *Id.* at 56 (noting that a process which should have taken a few days took seven weeks due to two basic conflicts: first, the ground rules and related documents agreed upon by earlier British-Irish agreements were opposed by the Unionists and second, as noted, some Unionist parties challenged Mitchell's authority as chairman of the talks).

²⁴ *Id.* at 33 (explaining that in order for a party to enter the talks they had to commit to the principles of democracy and nonviolence, which eventually became known as the Mitchell Principles).

²⁵ *Id.* at 62 (describing the voting procedure contained in the rules—sufficient consensus—as complex, but also ensuring that any agreement reached in the talks had broad support among the parties).

²⁶ *Id.* at 75 (maintaining that "[t]he rules of procedure imposed upon all the participants a rule of confidentiality" so that the negotiations remained private, but the

develop a very brief and general agenda for the opening plenary session, and on October 15, agreement was reached.²⁷ Once a general agenda had been established, substantive negotiations could begin, taking place along three tracks or strands.²⁸ However the issue of decommissioning—Unionists wanted paramilitary arms to be given up before negotiations could begin—arose postponing substantive negotiations for some months.

During discussions on decommissioning and subsequent negotiations, Senator Mitchell and his colleagues conducted many meetings with the parties through the use of strands to deal with global kinds of issues, subcommittees, smaller group meetings, and informal and individual meetings. They constantly put questions to the parties, asking for their responses and positions, both orally and in writing. They sought to understand each party's needs and fears and then to communicate them to the other parties as well as allowing the parties to directly communicate with each other through various formats. They created options for the parties to consider, drew them into every aspect of the process, and used caucuses, shuttle diplomacy, and smaller group discussions to find areas of agreement. Plenary sessions were convened judiciously to receive reports, to have exchanges at times, and to deal with important issues affecting the talks that had arisen. By November 10, 1997, opening discussions were complete and the parties were ready to get into active negotiations.²⁹ To jump-start the negotiations, Senator Mitchell created a document identifying the key issues for resolution to generate some give and take.³⁰ As he noted, "[o]nly when all of the issues were seen together could all the parties get a sense of where the necessary trade-offs and compromises might be made."³¹

Throughout the negotiations, Senator Mitchell and his colleagues paid a great deal of attention to the importance of symbols, appearances, and ways to facilitate communications. For example, while most of the negotiations took place at Stormont, a suburb of Belfast, they were commenced in an undistinguished government office building rather than the building from which a Protestant-dominated Parliament once governed the North.³²

opposite occurred with leaks and press conferences becoming quite regular throughout the all-party talks).

²⁷ *Id.* at 84.

²⁸ *Id.* at 120 Strand One dealt with the political arrangements in Northern Ireland, Strand Two dealt with relations between Northern Ireland and the Republic, and Strand Three addressed relations between the British and Irish governments. *Id.*

²⁹ *Id.* at 122–23.

³⁰ *Id.* at 123.

³¹ *Id.*

³² *Id.* at 48 (describing how the Parliament building was regarded by Nationalists as a symbol of Unionist domination).

Similarly, when some of the negotiations left Belfast, they were held in both London and Dublin so that both communities would not see a tilt in favor of the other.³³ Care was also given to limiting the number of people who would be present at key meetings in order to encourage dialogue, and also to whether the presence of a stenographer or note taker might chill discussion.³⁴ As the negotiations entered 1998, the agenda became more specific and the meetings more frequent with a deadline imposed to build a momentum toward an agreement. Senator Mitchell expressed the importance of a steadfast deadline in reaching an agreement:

I began to think about a deadline, earlier than the one at the end of May that Blair had already set . . . without a hard deadline these people just would not decide anything: the decisions are so fraught with danger for them that they would just keep talking and talking and talking. Eventually, this process would just peter out or, more likely, some dramatic outside event—some new atrocity—would just blow it up. Either way, it would fail. It had to be brought to an end; that was the only possible way to get an agreement. A deadline would not guarantee success, but the absence of a deadline would guarantee failure.³⁵

Eventually Easter weekend of 1998 was set as the deadline and the parties unanimously agreed.³⁶ On April 10, 1998, after nearly two years of talks and negotiations, an agreement was reached.

The process reflected a number of approaches and mechanisms used in the field of American labor relations, such as committees and subcommittees, smaller group discussions, and the creation of committees in the final agreement for issues that were not capable of resolution at the point of the final agreement. Far more than format, location, and the like was the constant sensitivity of the Senator to each of the parties engaged in the process. He met with them frequently and separately over every aspect of the talks, made sure their views were understood and advanced, sought their suggestions for solutions, and circulated to them for comment drafts of documents containing questions, issues, and options. The respect he gave to each made it their process and inspired confidence in him and his colleagues.

³³ *Id.* at 125 & 135.

³⁴ *Id.* at 124.

³⁵ *Id.* at 126.

³⁶ *Id.* at 143 (describing Easter weekend as an appropriate deadline because it had historical significance, was an important weekend in a religious society such as Northern Ireland, and if an agreement was reached by Easter, a referendum could be held in May and an assembly election could take place by late June).

The manner in which Senator Mitchell conducted himself throughout the talks made its success possible. For example, despite the confidentiality of the talks, leaks were commonplace, and yet, the parties came to understand that the Senator (and his colleagues) would make no exception for themselves regarding the confidential nature of the talks. This proved providential because when the first draft of the final agreement was circulated in April 1998, confidentiality was of critical importance and when Senator Mitchell demanded it at that point, the parties complied.³⁷ Also interesting to note, in terms of the personal role of a mediator, is the tone struck by Senator Mitchell in his public statements. When he spoke to the press at different junctures, his accounts of the negotiations were terse, but he always expressed hope that an agreement could be found.³⁸ Nothing was conveyed that could be misinterpreted or that exalted the role or importance of the mediator. Throughout, Senator Mitchell helped build toward an agreement by reminding the parties that the people wanted peace and that the alternative to an agreement was not acceptable.³⁹

Senator Mitchell's service as chair of the peace talks was, I believe, a testament to the viability of American mediation in international dispute resolution. He brought to his assignment extraordinary personal qualities (most importantly listening, patience, and perseverance) and superlative experience at the center of American politics. The discipline that he brought to his office and the respect he gave to each party engaged in the process are a model for anyone asked to mediate a dispute, whether or not in a context of armed conflict.

C. The Peace Agreement

The Agreement acknowledged that only the people of Northern Ireland could decide its future.⁴⁰ Further, it created important institutions for governance such as a Northern Ireland Assembly, with a Cabinet-like Executive.⁴¹ In addition, it established a North/South Ministerial Council to foster greater relationships with the Republic of Ireland⁴² and set up bodies

³⁷ *Id.* at 165.

³⁸ *Id.* at 87, 97, 98, 127 & 158 (demonstrating Senator Mitchell's constant effort to remain positive and hopeful no matter how difficult progress became).

³⁹ *Id.* at xiii.

⁴⁰ Agreement, *supra* note 133, Constitutional Issues ¶ 2(i)–(v).

⁴¹ *Id.* Strand One: Democratic Institutions in Northern Ireland ¶ 3.

⁴² *Id.* Strand Two: North/South Ministerial Council ¶ 4.

to deal with policing, decommissioning of weapons, and confidence-building measures.⁴³

Despite the progress, however, “there is not yet a durable peace,”⁴⁴ with outbreaks of violence continuing and a suspension of the power-sharing Northern Ireland Assembly in effect.⁴⁵ Difficult issues of implementing the Agreement also exist in such areas as police reform and decommissioning, but important steps in both areas have occurred.⁴⁶

Nevertheless, the final settlement is noteworthy for how many interests of both Nationalists and Unionists it reflects. For Nationalists, their participation in the government of the North and the release of prisoners were of major importance. For Unionists, the constitutional status of Northern Ireland and the decommissioning of weapons were paramount. By identifying and negotiating many issues, the parties were able to find many areas to compromise and, in the give and take, to have their important interests recognized.

D. *Beyond the Peace Agreement*

As the peace process took shape in the 1990s in Northern Ireland, mediation activities elsewhere in that society were occurring, and they are expanding as this Article goes to press. Some of these efforts involve parade disputes at the interfaces that bring the different Nationalist and Unionist communities in contact with each other.⁴⁷ Other mediation activities involve community disputes of an infinite variety. Mediation activities are also plentiful in the workplace, in schools, in incarceration facilities, and in the legal profession.

On a visit to Northern Ireland a few years ago, I had occasion to meet a number of young students engaged as mediators in their school and learned that one of the challenges they faced was how to maintain one’s neutrality

⁴³ *Id.* Decommissioning & Policing and Justice ¶¶ 7–9.

⁴⁴ MITCHELL, *supra* note 8, at xi.

⁴⁵ See Warren Hoge, *The Troubles in Ulster Shift from Street to the Assembly*, N.Y. TIMES, Oct. 14, 2002, at A1 (reporting that Britain declared the Northern Ireland Assembly suspended, after the legislature’s Protestant members said they would resign their posts—in effect ending the power-sharing government—in protest of continuing IRA activities); see also Warren Hoge, *The Last Hard Case: Bleak, Stubborn Belfast*, N.Y. TIMES, June 25, 2003, at A4 (describing Northern Ireland as a balkanized northern fringe of Europe and stating the peace agreement has yet to bring permanent political stability to Northern Ireland).

⁴⁶ Dunn & Nolan-Haley, *supra* note 7, at 1373.

⁴⁷ Mediation’s role in resolving parade disputes is discussed in further detail at Part III.B., *infra*.

when mediating among friends. More recently, in a program at Columbia University involving a group of peace builders from Northern Ireland, they told me that they considered neutrality to be the most important characteristic for service as a mediator. They emphasized the importance of a mediator gaining an understanding of all parties involved in a dispute by meeting separately with everyone involved and avoiding words and conduct that might suggest partiality. They mentioned, as an example of a helpful approach, a team of mediators (one Catholic and one Protestant) who each met with members of the Unionist and Nationalist communities so as to be better informed about the dispute they were to mediate. It was important, they said, that each be seen as making an effort to be objective. Brendan McAllister, who has done much to institutionalize mediation in Northern Ireland, has described the following characteristics that he has tried to bring to the process: impartiality, a focus on the “human dimensions” of the conflict, attention to restoration of relationships, familiarity with the context, and a search for solutions that address the problems at hand.⁴⁸ He and his colleagues have enjoyed many successes.

IV. INTERNATIONAL OBJECTIONS TO THE “AMERICAN MODEL”

Some observers have stated that the American Model of dispute resolution is too rule-bound to succeed in the context of an intractable armed conflict. This perception calls into question two aspects of the American Model: 1) its rule-based approach to the mediation of a given dispute, and 2) its emphasis on the neutrality of the independent third party mediator. Brian Currin of South Africa, who spent two years in Northern Ireland mediating parade disputes, notes:

My perception of American style mediation is that it is inclined to be rule bound. What makes that more problematic is that the rules have been developed in the US. These rules facilitate conciliation in the US because they are themselves an expression of American thinking and culture. It's like the West assuming that if a Country does not have a multi-party system it cannot be a democracy. In my experience mediation processes need to be contextual. I for example found that my approach to mediation in SA [South Africa] is very different from my approach in NI [Northern Ireland] . . . Before a foreigner can mediate successfully in another country

⁴⁸ See Brendan McAllister, *Mediation and Peace-Building*, Feb. 2000, available at <http://www.mediation-network.org.uk/html/papers.html>.

he or she must understand the culture, the traditions, the people, the issues and all the sensitivities—a very tall order.⁴⁹

Others in Northern Ireland have noted that armed conflicts are cross-cultural, typically involving estranged communities with a lack of understanding for the competing goals and interests of the other parties involved.⁵⁰ Consequently, an independent third party without a vested interest in the outcome, utilizing a structure not in tune with the context of the mediation, will reach a partial settlement at best.⁵¹

Quite clearly, rules not formatted to the context of an international dispute may sacrifice the interests of the parties involved.⁵² According to one observer, such rules can be structured into a model with very detailed procedures as the basis,⁵³ involving assumptions not necessarily shared or recognized by the participants.⁵⁴ If a participant disputes any of the ordered rules or procedures, possibly resulting in a lack of participation by a party not coming to the table, the results will necessarily be less successful.⁵⁵ Thus, in order to sustain a successful international mediation, experience suggests that there must be flexibility based on an understanding of the situations and cultures involved, rooted in local realities.⁵⁶ Interestingly, Senator Mitchell has noted that his political experience taught him “the importance of having a plan and sticking to it while retaining the flexibility to make adjustments as circumstances change; the necessity of total commitment; and the need for patience and perseverance to overcome inevitable setbacks.”⁵⁷

As to the neutrality of the mediator, with full prior disclosure of possible conflicts of interest, such an imperative may be unworkable in the context of international armed conflicts.⁵⁸ International mediators are often chosen

⁴⁹ E-mail from Brian Currin, international mediator based in South Africa (Nov. 5, 2002) (on file with author).

⁵⁰ See Brendan McAllister, *The Role of Mediation in Conflict Resolution*, Apr. 26, 2001, available at <http://www.mediation-network.org.uk/html/papers.html>.

⁵¹ E-mail from Sue Williams, peacemaking activist in Northern Ireland (Oct. 23, 2002) (on file with author).

⁵² E-mail from Brian Currin, *supra* note 49 (noting the differences in his approach to mediation in South Africa and Northern Ireland).

⁵³ E-mail from Sue Williams, *supra* note 51 (citing the ordered structure of Herbert Kelman’s “Problem-Solving Workshops”).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*; see also e-mail from Brian Currin, *supra* note 49.

⁵⁷ See MITCHELL, *supra* note 8, at 8.

⁵⁸ Marie Olson & Frederic S. Pearson, *Civil War Characteristics, Mediators, and Resolution*, 19 CONFLICT RESOL. Q. 421, 421–45 (2002).

because of their relation to the dispute, rather than distance from the dispute.⁵⁹ In *Civil War Characteristics, Mediators, and Resolution*, Marie Olson and Frederic S. Pearson focus on this principle broadly, dividing the earth into seven regions with distinct identities.⁶⁰ Their theory is that mediators with like regional identities to parties involved in armed conflicts must live directly with the results of their labor.⁶¹ Conversely, neutral mediators indicate a physical separation from the conflict's consequences, lacking an outcome preference.⁶²

A. Northern Ireland's Parades Disputes

In the context of Northern Ireland, the identity of the mediator has a more localized significance. An example of this is in the resolution of parades disputes. Parades, as a commemoration of significant historical events based upon religious, national, or political identity, have been a significant aspect of Irish life for hundreds of years.⁶³ In the late 1990s, however, parade disputes, which often involved violent clashes of Catholics and Protestants with each other or the police, rose in number and began to dominate the political agenda.⁶⁴ In an effort to resolve the annual dispute over parade routes, the Northern Ireland government solicited The Independent Review of Parades and Marches (Review), released in January 1997.⁶⁵ The Review received over three hundred submissions of suggestions for parade dispute reform, including submissions from local communities and major political parties and NGOs alike.⁶⁶ This expression of local sentiment resulted in the Public Processions Act of February 1998 (Act), creating the Parades Commission (Commission).⁶⁷ The Act states that the goals of the Commission are to promote greater understanding of the issues relating to public processions, and to promote and facilitate mediation as a means of resolving disputes.⁶⁸ Currently, the Commission uses twelve

⁵⁹ *Id.* at 424.

⁶⁰ *Id.* (North America, Central and South America, Africa, Middle East, Central and South Asia, the Pacific, and Europe).

⁶¹ *Id.*

⁶² *Id.* at 425.

⁶³ Neil Jarman, *Regulating Rights and Managing Principle Order: Parade Disputes and the Peace Process, 1995–1998*, 22 FORDHAM INT'L L.J. 1415, 1416 (1999).

⁶⁴ *Id.* at 1415.

⁶⁵ *Id.* at 1425.

⁶⁶ *Id.* at 1426.

⁶⁷ *Id.* at 1429.

⁶⁸ *Id.* at 1430.

authorized officers (equally divided between Protestants and Catholics) who are self-employed non-staff members, to collect local sentiment leading up to a parade and report it to the Commission.⁶⁹ There is a similarity between what they do and sometimes what mediators do in an informal kind of way. The goal of the Commission's informal mediation is to "help strengthen the position of those people on either side of a dispute, who have difficulties in engaging in direct discussions with opponents . . . playing a growing part in resolving disputes behind the scenes."⁷⁰

One significant example of a parade dispute using local mediators with a vested interest in the result to facilitate dialogue and a peaceful resolution is the Apprentice Boys' "Relief of Derry" celebration in the city of Derry.⁷¹ In 1995, with the re-opening of the Derry walls, the Apprentice Boys attempted to march the full circuit of the walls for the first time since 1969.⁷² The Bogside Residents Group (BRG), representing the Catholic community inhabiting the area of the city within the walls, occupied sections of the walls during the night without any face-to-face communication.⁷³ When the issue resurfaced in 1996, the BRG and Apprentice Boys agreed to meet face-to-face, enlisting local M.P. John Hume to facilitate negotiations.⁷⁴ The groups met a total of four times, each submitting a separate set of proposals for evaluation.⁷⁵

In 1997, the newly formed commission became involved, and an effort to resolve the dispute began months in advance.⁷⁶ In an effort to open discussions to a wider constituency, eighty representatives of local business, church, and statutory communities were invited to participate in two single identity debates.⁷⁷ When the BRG and Apprentice Boys initially refused to meet, the Mayor of Derry offered his services and office as mediator.⁷⁸ The Mayor began by presenting the resolution proposals of the two parties to the

⁶⁹ Parades Commission for Northern Ireland, *Fourth Annual Report*, Apr. 2001 Mar. 2002.

⁷⁰ Press Release, Parades Commission for Northern Ireland, News from the Parades Commission: Parades Commission Annual Report 2001–2002 (June 20, 2002) (on file with author).

⁷¹ INTERNATIONAL CONFLICT RESEARCH (INCORE), *Case Study 5—Derry/Londonderry in Mediation in Practice: A Report of the Art of Mediation Project 50* (1998).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* (referring to the City of Derry Parades Commission).

⁷⁷ *Id.*

⁷⁸ *Id.*

representatives of the single identity debates.⁷⁹ In an effort to further communication, the Mayor and Commission facilitated proximity-style talks between the groups, culminating in face-to-face meetings the week before the scheduled parade.⁸⁰ While no settlement was reached, the parade followed a partial route in the absence of violence during a time of heightened conflict in the rest of Northern Ireland.⁸¹ Thanks to mediation efforts, subsequent marches of the Apprentice Boys have occurred without any major eruptions of violence.⁸²

The lack of a permanent resolution of this particular Parade issue should not overshadow the steps taken towards reaching a mutually acceptable result. The two parties have not only responded to the involvement of local business leaders who most certainly had a stake in the outcome, but at times they even requested meetings with the Mayor, John Hume, M.P., and other leaders. This furthers the idea that a mediator to an armed conflict must identify with the local community, showing not only an interest in reaching a result, but also that the result would affect the mediator as well as the parties involved.

B. An American Counter-Example

An example of a program in the United States that expresses the advantages of breaking from the status quo of neutrality is Herbert Kelman's Program on International Conflict Analysis and Resolution (PICAR) at Harvard University.⁸³ Kelman theorizes that a balanced team of participants is necessary for the resolution of a dispute.⁸⁴ Sharing a personal identity with one party to a dispute can add credibility to a mediator, implying genuine

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² See *Parade Hailed as Flagship*, BBC NEWS ONLINE, Dec. 4, 1999, at http://news.bbc.co.uk/1/hi/northern_ireland/549874.stm (observing that the Protestant parade in Northern Ireland had passed off relatively peacefully for the first time in recent years); see also *Apprentice Boys' Parades Pass Off Peacefully*, RTE NEWS, Aug. 12, 2000, at <http://www.rte.ie/news/2000/0812/north.html> (describing how the annual parade in Derry passed off without serious incident); *Parade Passes Off Quietly*, BBC NEWS ONLINE, Aug. 11, 2001, at http://news.bbc.co.uk/1/hi/northern_ireland/1485107.stm (noting that the Apprentice Boys' march through Derry took place without any violent disruptions).

⁸³ Herbert C. Kelman, *Experiences from 30 Years of Action Research on the Israeli-Palestinian Conflict*, at http://www.pon.harvard.edu/news/2002/kelman_peace_making.php3.

⁸⁴ *Id.*

personal concern for the outcome, rather than ulterior motives.⁸⁵ Conversely, ethnic identities may raise questions of bias from an opposing party.⁸⁶ However, a balanced team of participants implies not neutrality, but even-handedness.⁸⁷

PICAR aims to influence the macro-process of dispute resolution by informing participants through micro-processes of dialogue. In order for the macro-process to succeed, it must follow broad general steps: identification and analysis of the problem, joint shaping of ideas for solution of the dispute, influencing the other side through positive incentives, and creating a supportive environment for negotiations.⁸⁸ These goals can be daunting in the face of an intractable dispute raised to the level of armed conflict. PICAR establishes micro-processes involving parties to the dispute in an attempt to provide positive inputs into the macro-process, and hopefully to serve as a metaphor for an eventual outcome at the macro-level.⁸⁹

These micro-process techniques are exemplified by Problem-Solving Workshops (Workshop).⁹⁰ The Workshops are not negotiations and are not meant to be binding.⁹¹ Instead, they are meant to provide a closed arena for participants, authorized to negotiate, to conduct exploratory interaction impossible in a negotiation setting.⁹² Ideally, these communications and observations create new ideas and understandings that can be fed into the political debate.⁹³ The Workshop's third party does not participate substantively in the discussions or offer solutions, merely monitoring the ground rules and setting agendas for discussion.⁹⁴ The underlying goal of the Workshop is to create an understanding of the other party's perspective that can be disseminated into the macro-process of resolving the dispute.

C. A Brief Return to the Peace Process

Applying the forgoing observations to the Northern Ireland Peace Agreement, Senator Mitchell has shown that a deep understanding of the parties is, in fact, inherent in the American Model. His persistent listening

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

and understanding established a vested interest in the result, although it was not based on his physical geography. Additionally, such American practices as shuttle diplomacy and the use of committees and sub-committees are typical of both gaining trust, and building a deep understanding of the dispute. Mitchell's extension of the deadline in the last weeks of the peace talks is evidence that rules and procedures are meant to further the result; they are not greater than the result. When agreement was in jeopardy, the rules were adjusted in an effort to reach a result.

V. CONCLUSION

What then might be said about mediation in armed conflict from the perspective of a survey of mediation in Northern Ireland?

The appropriateness of mediating in armed conflict raises questions involving the context of the dispute, its receptiveness to a mediation process, who should participate in the mediation and under what circumstances, and who should serve as the mediator or mediators and by what method of appointment. As noted, Northern Ireland was ready for the peace talks as a result of much hard work by the Irish and British governments and some of the party leaders, informed by a widespread feeling among the people that a solution needed to be found. The pre-negotiation development was extensive, setting an important framework for the talks. Without such pre-conditioning, it is doubtful that any success could have been achieved. In terms of the talks, the attention to detail given by George Mitchell, to the fairness of the process, and to each party every step of the way enhanced his credibility, inspired trust and confidence, and ultimately led to his ability to keep the parties working toward an acceptable agreement in the darkest of moments. If there is anything I saw in Senator Mitchell's style, as I have already noted, it was the respect he gave to everyone, coupled with his scrupulous avoidance of conduct that would have undermined his office and his enormous ability to lower the "temperature" and keep hope alive. This model of mediation clearly has a distinct place in situations of armed conflict.

To what extent models of mediation used in the United States can successfully be practiced abroad by our citizens is a separate question. For reasons applicable to Northern Ireland, an American chair of the talks was acceptable to the convening parties, the Irish and British governments. The outside mediator, however, may not always be the right choice to deal with other disputes within a society faced with arms. As noted in a communication I recently received from Brian Speers, a distinguished lawyer in Northern Ireland who has done pioneering work in the area of mediation:

In our social and political life, I believe there is a tiredness with “outsiders” becoming involved—however well meaning they are. The people who live here and work here need to become able to interact with each other directly and not feel someone will come running to help. That attitude in my view leads to a lack of acceptance of the due weight of responsibility.⁹⁵

He adds, “[p]erhaps the single observation I would make is that outsiders can teach, give valuable perspective and encourage but they will in time withdraw and the challenge will be to ensure that sufficient local expertise is available to provide that same support from within.”⁹⁶ Another thoughtful communication I received from Sue Williams, a distinguished consultant in the area of mediation in Northern Ireland, also emphasized the importance of taking account of the local realities.⁹⁷ She observed that most armed conflicts are cross-cultural and therefore the mediation approach that works best must reflect a very good understanding and analysis of the situation and cultures involved.⁹⁸ In identifying herself with flexible approaches, she pointed to the stages of a conflict. There may be a need, she said, for a convoking role for a third party, referring to Jimmy Carter; or there may be a need for a detailed negotiation and someone like George Mitchell; and there may be a need for other types of third party assistance after an agreement is reached.⁹⁹

According to Speers and others with whom I have spoken in Northern Ireland, there is a place for a new type of mediation, aimed at managing, rather than resolving, a dispute.¹⁰⁰ Where substantial differences exist, there is much to be gained, Speers said, from providing a listening post and a safe environment to share ideas and try on new thinking.¹⁰¹ He added that many of the skills involved in the more formal process are helpful here, such as summarizing, listening, and managing a dialogue.¹⁰² Avery Bowser, who has been involved with mediation involving families and the youth in Northern Ireland, finds American mediation practice useful, if not applied mechanistically.¹⁰³ He mentioned a number of situations with which he was

⁹⁵ E-mail from Brian Speers, CMG Solicitors, Belfast (Oct. 14, 2002) (on file with author).

⁹⁶ *Id.*

⁹⁷ E-mail from Sue Williams, *supra* note 51.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ E-mail from Brian Speers, *supra* note 95.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ Telephone interview with Allan Craig, Governor IV of the Northern Ireland Prison Service (notes on file with author).

familiar where the mediator was someone known to the parties and might not have satisfied an American conflict of interest standard, but yet had the ability to inspire confidence and trust by creating conditions under which the parties wanted to support what they felt they had created on their own in the mediation process.¹⁰⁴ He stressed the importance of paying attention to what parties want and said that mediators from abroad must convey their ideas with humility and with an openness to learn from the experiences of others.¹⁰⁵

Because of his work in Northern Ireland prior to the peace negotiations, on both economic relations and decommissioning, Senator Mitchell was familiar with the country, its people, their culture, and the conflict. This previous involvement, along with his ties to America as a former Senator, caused him to have greater concern not just for his personal reputation but also for a successful peace process. The United States wanted the people of Northern Ireland to achieve a peaceful resolution to the "Troubles" and Senator Mitchell wanted the same for the people and country he had come to know so well.

It is clear that there are many opportunities for those who live in the United States to contribute to the promotion of mediation abroad. We have much to offer in terms of our models and, in turn, there is much we can learn from what is occurring abroad in the handling of difficult ethnic and racial disputes. This country's growing attention to the field of ethics in mediation, on the importance of mediator training, and on the quality of mediators and the processes they use all seem highly relevant to the mediation of conflicts in societies dealing with armed conflict.

Citizens who serve abroad, of course, must become knowledgeable about the country involved in order to have any chance of being credible. No matter what model is used, without in-depth knowledge, missteps are likely to occur in the most basic of areas, such as the language used, the clothes worn, the places stayed, etc. It is hard to see how a mediator unfamiliar with the context can be productive and helpful in framing issues and working with parties in the creation of options and in finding a solution. Despite the challenges, American mediation practice and mediators, as demonstrated by Senator George Mitchell, have played and can play a positive role in a world filled with much conflict.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*